United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1125

To be argued by
HOWARD W. GOLDSTEIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1125

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIE LEE UNDERWOOD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Willie Lee Underwood appeals from a judgment of conviction entered on December 5, 1975, in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 75 Cr. 396, filed on April 17, 1975, charged Underwood with possession of stolen mail (Counts 1-39) and with uttering United States Treasury checks with false, forged and counterfeited endorsements (Counts 40-53) in violation of Title 18, United States Code, Sections 1708 and 495, respectively.* The indictment charged that Underwood dealt in these checks from May 1, 1972 to September 16, 1974.

* The stolen mail counts all involved New York City or New York State checks.

Trial commenced on October 20, 1975, on a redacted indictment involving twenty-two stolen mail counts and twelve treasury check counts.* On October 23, 1975 the jury returned a verdict of guilty on all thirty-four counts of the redacted indictment. The Court noted that "on the evidence that you heard in my judgment your verdict could very hardly be otherwise" (Tr. 508).**

On December 5, 1975, Judge Owen, noting that the trial testimony had disclosed, among other things, "a long history here of fencing stolen checks of all kinds and totalling over the period some $4,000, $5,000," imposed concurrent terms of three years' imprisonment on Counts 1, 9, 10, 13-16, 20, 22, 25, 27, 28, 30-40; and six years' imprisonment suspended, with probation for six years on Counts 43-53. The Court also required restitution to the various victims as a special condition of probation (Tr. 525).***

Statement of Facts

1. The Trial

The Government's proof at trial established that Underwood operated Willie's Meat Market, 120 Lenox Avenue, New York City, and that in 1972, 1973, and

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* The redacted indictment consisted of Counts 1, 9, 10, 13-16, 20, 22, 25, 27, 28, 30-40, 43-53 of the original indictment. The remaining counts were dismissed before trial on motion of the Government.

** "Tr." refers to the trial transcript; "App." refers to the defendant's appendix; "GX" refers to Government Exhibits at trial.

*** Although at sentencing Judge Owen said "six years" probation on Counts 30 and 40 (Tr. 525) the probation was properly reduced in the written judgment to the legal limit of five years, and the imprisonment terms were made to cover Counts 30 *through* 40 so as not to leave any unsentenced counts.

1974, he repeatedly used stolen city, state and federal checks with forged endorsements in order to pay his store's bills for the full range of products he purchased from wholesale suppliers. Underwood bought these checks at an enormous discount from face value from individuals, such as drug addicts, who had stolen the checks from mailboxes. When questioned by Secret Service agents on two occasions about these checks, Underwood lied about his knowledge of the payees and the practices at his store.

The Government called twenty-nine witnesses who were payees on the checks charged in the redacted indictment and three other checks which were received in evidence as proof of similar acts. (GX 1-37). The payees all testified to the effect that usually, after a particular check they were expecting to arrive by mail was not received they dutifully reported the check as missing to the proper authorities, and in time the check was replaced. The payees further testified that they had never received the various original checks; that they had not endorsed them; that they had not authorized anybody to endorse the checks; that they did not know and had never heard of Willie Underwood; and that they had never shopped at 120 Lenox Avenue or at Willie's Meat Market.*

Various merchants and businessmen who had supplied products to Willie Underwood testified that Underwood had given them the stolen checks in evidence and many other such checks, as payment for the supplies.** When the checks were returned for insufficient funds the merchants went back to Underwood and asked for payment. Sometimes Underwood made the check good with cash,

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* It was stipulated that all of the checks were deposited in and sent through the United States Mails. (Tr. 8.)

** The evidence showed that Underwood also paid the Telephone Company and his landlord with these checks.

and sometimes with more checks, some of which bounced again. When some of the merchants went back to Underwood he was nowhere to be found, causing thousands of dollars in losses to these businessmen.

Underwood was first interviewed on January 21, 1974 by Secret Service Agents who asked about his receiving and using stolen and forged checks. (Tr. 406-08). He claimed falsely at that time that he knew all of his customers personally, and that some came all the way from Staten Island to buy meat from him (Tr. 408). After that interview Underwood continued to negotiate stolen and forged checks and on January 21, 1975 he gave more false statements to the agents (GX 43). At that time he claimed that he knew various payees and gave addresses for them that were different and, in fact, quite distant from the true addresses on the check. (Tr. 390-92).

Any possible doubt about Underwood's knowledge that the checks were stolen and the endorsements forged was resolved by the testimony of Jose Rodriguez, a drug addict who testified that he had stolen checks from mailboxes, forged the payee's signature on each check and sold the checks to Underwood at substantial discounts.

The defense presented no evidence at trial, and Underwood quite properly does not raise any issue with respect to the sufficiency of the evidence to support his conviction.

2. The Grand Jury Proceedings

On January 22, 1975, Underwood was arrested and arraigned before the Honorable Harold Raby, United States Magistrate, upon a complaint alleging a violation of 18 U.S.C. § 495 sworn to by Secret Service Agent Terry Chodosh. Underwood was released on his own recognizance.

On April 14, 1975, Underwood was served with a subpoena to appear before the Grand Jury at 12:15 P.M. on April 16, 1975, in connection with alleged violations of 18 U.S.C. §§ 495 and 1708. On April 15, 1975, at 5:00 P.M. Assistant United States Attorney Vizcarrondo advised Edward Bobick, counsel for Underwood, that his client was a target of the Grand Jury's investigation and would be asked questions on that subject. Mr. Bobick stated he would advise Underwood to assert his privilege against self-incrimination, but Vizcarrondo told him Underwood would have to appear nevertheless. Bobick stated that defense counsel would be present at the Grand Jury for Underwood's appearance, but did not ask or tell Vizcarrondo to refrain from proceeding until defense counsel was present. (See App., Ex. E-G).

On April 16, 1975, at 12:30 P.M., fifteen minutes *after* the scheduled time for Underwood's Grand Jury appearance, Assistant United States Attorney Vizcarrondo asked Underwood to enter the grand jury room. Defense counsel was not present at that time. Mr. Underwood was advised of the nature of the investigation; that he had a right to refuse to answer any question that might tend to incriminate him personally in any way; that anything he said before the Grand Jury could be used against him at another time in a court of law; that he had a right to have an attorney of his choice outside the grand jury room and to go outside and consult with that attorney before he answered any questions; that if he wished to have the assistance of an attorney but could not afford one, the court would appoint an attorney to represent him; and that if he deliberately told a lie to the Grand Jury he subjected himself to possible prosecution for the crime of perjury. Mr. Underwood indicated that he understood each of those instructions. Fifteen minutes later, or one half hour after the time scheduled on the subpoena, defense counsel arrived and

consulted with Underwood, after which Underwood ceased testifying. At no time before counsel arrived did Underwood say he was expecting a lawyer or ask to speak with one, despite having been advised he could do so if he wished.

At the trial, the Government did not offer any of Underwood's grand jury testimony into evidence.

3. The Sentencing Proceedings

Underwood was sentenced by Judge Owen on December 5, 1975. At that time, he was represented by Steven Rochkind, Esq., an associate of trial counsel, who had personally known Mr. Underwood for a number of years and had represented him in a number of civil matters. (Tr. 523).

The Assistant United States Attorney who had tried the case recommended at sentencing that any sentence of incarceration imposed by the Court on any counts be supplemented by a sentence of probation on the other counts with the condition that Underwood make restitution to the victims of his crimes. In response to the Court's inquiry as to whether that was a realistic position, the Assistant United States Attorney told the Court that facts which the government had been prepared to prove at trial indicated that the defendant had maintained a substantial bank balance for one year during the period of his crimes; that the defendant owned two cars during one period and that both the defendant and his wife had worked and apparently were then employed.

Although at the time of sentencing counsel did not ask to see the pre-sentence report, counsel made a complete statement in mitigation on behalf of the defendant. In that statement, counsel explicitly challenged the ac-

curacy of the information provided to the Court by the Government:

> "His life style, as far as I have known it, regarding even the fees that he had paid us, has been very, very, low.
>
> He is attempting to make a living for his family and that is all he has attempted to do. He is not riding around in big cars, taking fancy vacations and having big accounts somewhere." (Tr. 523-24).

The Court, citing the proof at trial, concluded that "that's the way [Underwood] ran the business" and that "there has been a long history here of fencing stolen checks of all kinds and totalling over the period some $4,000, $5,000." (Tr. 524, 525). Three year concurrent terms of imprisonment on Counts 1, 9, 10, 13-16, 20, 22, 25, 27, 28, and 30-40 were imposed. Concurrent terms of six years, sentence suspended, and five years probation,* with a special condition that Underwood make restitution, were imposed on Counts 43-53.

By motion dated March 16, 1976, Underwood, by his trial counsel, moved, pursuant to Rule 35, F.R.Cr.P., for an order reducing his sentence. The affidavit of trial counsel reiterated what had been stated at sentencing by his associate. The motion was denied.

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* Per the written judgment.

ARGUMENT

POINT I

Underwood Was Not Deprived of His Fifth and Sixth Amendment Rights Before the Grand Jury.

In his initial brief Underwood claimed that he had been prejudiced by having been called to testify before the Grand Jury which indicted him. He argued that because counsel was not present, under the circumstances described above, the indictment should be dismissed, or in the alternative the case should be remanded for a hearing to determine whether there was sufficient evidence before the Grand Jury, *dehors* Underwood's testimony, to sustain the indictment.

In a supplemental brief, Underwood withdraws the request for relief contained in Point I of his initial brief, conceding that the other evidence before the Grand Jury was sufficient to support the indictment. Nevertheless, Underwood asks this Court to issue an advisory opinion chastising the office of the United States Attorney. Such an opinion would be wholly unwarranted.

First, as noted above, Underwood has unequivocally withdrawn his request for relief.

Second, it is clear that an indictment valid on its face cannot be challenged on the ground that the Grand Jury considered incompetent or even illegally seized evidence. *United States* v. *Calandra*, 414 U.S. 338 (1974); *Costello* v. *United States*, 350 U.S. 359 (1956); *Lawn* v. *United States*, 355 U.S. 339 (1958). Thus, even assuming that Underwood's grand jury testimony was obtained in violation of his constitutional rights and he had not withdrawn his request for relief, the most Underwood would

be entitled to would be suppression of any use of his testimony at trial. *United States* v. *Addonizio*, 313 F. Supp. 486, 494 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). However, because no use was made of Underwood's grand jury testimony at trial, he suffered no prejudice.*

Third, and most important, Underwood's contention that his testimony before the Grand Jury was taken in violation of his constitutional rights cannot withstand scrutiny.

A. Underwood was not deprived of his Sixth Amendment Right to Counsel Before the Grand Jury.

Underwood contends that his testimony before the Grand Jury was taken in violation of his Sixth Amendment right to counsel. That claim is entirely without merit.

The Government does not dispute that Underwood's Sixth Amendment right to counsel attached at the time of his arraignment before the magistrate on the criminal complaint sworn to by Secret Service Agent Chodosh. *White* v. *Maryland*, 373 U.S. 59 (1963). However, the talismanic invocation of the phrase "right to counsel" does nothing to resolve the question of whether Underwood's substantive constitutional rights were violated at the time of his grand jury appearance.

It is well settled that a grand jury witness does not have a right to the presence of counsel inside the grand

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* Although Underwood moved to dismiss the indictment on the ground that it had been obtained in violation of his rights, he never moved to suppress his own testimony. Underwood's motion was properly denied by the District Court.

jury room. *In re Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Corallo*, 413 F.2d 1306, 1330 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States* v. *Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *United States* v. *Addonizio*, *supra*, 313 F. Supp. at 494; Rule 6(d), F.R.Cr.P. This is true even when the witness has already been arrested, arraigned and charged in a criminal complaint, *Perrone* v. *United States*, 416 F.2d 464, 465-66 (2d Cir. 1971), or is otherwise the target of the grand jury's investigation. *United States* v. *Corallo*, *supra*, 413 F.2d at 1330; *United States* v. *Capaldo*, *supra*, 402 F.2d at 823-24; *United States* v. *Leighton*, 265 F. Supp. 27, 36-38 (S.D.N.Y.), *aff'd*, 386 F.2d 822 (2d Cir. 1971), *cert. denied*, 390 U.S. 1025 (1972).

Underwood's right to counsel with respect to the grand jury proceedings, therefore, was not an absolute right to have counsel present in the grand jury room, but, rather, the right to be given the opportunity to consult with counsel during his questioning should he so desire.* That right was fully protected. Underwood was explicitly told that he had the right to consult with an attorney of his choice before he answered any questions;** that he had

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* This distinguishes the cases relied upon by Underwood which hold that a defendant is entitled to the assistance of counsel at a lineup, *e.g. United States* v. *Wade*, 388 U.S. 218 (1967); *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) where it is recognized that counsel's actual presence is required to insure fairness and to preserve the defendant's right to meaningfully cross examine witnesses.

** Underwood's assertion that this warning was inadequate and could not form the basis of a voluntary waiver of the right to counsel because it failed to tell him "that he could consult with *his* retained attorney before answering any questions," Appellant's Brief at 18, is truly an exercise in semantic manipulation.

a right to have his attorney outside the grand jury room and to consult with him before he answered any questions, that the court would appoint an attorney if he could not afford one and that he had a right to consult with that court appointed attorney before he answered any questions. Underwood stated he understood those rights.* Nevertheless, without ever asking to consult with his attorney, he proceeded to answer the questions put to him. Under those circumstances, Underwood's Sixth Amendment rights were not violated.

Nor does the fact that Underwood's counsel called the Assistant United States Attorney the night before Underwood's grand jury appearance and told the Assistant that counsel would be present and Underwood would exercise his Fifth Amendment privilege justify a contrary conclusion. Both the affidavit of Underwood's counsel and the Assistant United States Attorney, submitted on Underwood's pre-trial motion to dismiss the indictment, make it clear that Underwood's counsel did not ask the Assistant to refrain from proceeding until counsel appeared. (See App. Exh. E-G). Nor did Underwood make such a request. Indeed, at the time Underwood was called into the grand jury, his counsel was already 15 minutes late and the Assistant had no assurance that he still planned to appear.**

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* Appellate counsel's attempt to depict Underwood as a completely ignorant layman does not square with the facts. Underwood clearly understood the extent of his right to counsel. When he did not understand what he was being told by the Assistant United States Attorney, he asked that it be repeated. Thus, Underwood asked the Assistant to repeat the perjury warning. No such request was made with respect to the Assistant's explanation of his right to counsel or any of his other rights.

** As noted *supra* at 5, when counsel finally appeared he was one half hour late. Nothing in the record supports Underwood's suggestion that the Assistant knew counsel would arrive

[Footnote continued on following page]

Moreover, it is clear that the Assistant United States Attorney was entitled to question Underwood to determine whether he would, in fact, assert his Fifth Amendment right against self incrimination. *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States* v. *Addonizio*, *supra*, 313 F. Supp. at 495; *United States* v. *Leighton*, *supra* at 36-38.

Underwood places primary reliance on *United States* v. *James*, 493 F.2d 323 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974). That case, however, is clearly inapposite. In that case, the Court found that James' Sixth Amendment rights had been violated because the Assistant United States Attorney continued to question James in the Grand Jury after he had explicitly asked to consult with counsel.* No such request was made here by appellant Underwood.

B. Underwood was not deprived of his Fifth Amendment Rights.

Underwood also contends that he was deprived of his Fifth Amendment rights in that, while he was informed of his right not to incriminate himself, he was not told that he had an absolute right to remain silent. Underwood had no such right.

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soon and was making a bad faith attempt to circumvent Underwood's rights. Such an allegation flies in the face of the fact that it was counsel's obligation to appear promptly on behalf of Underwood; that counsel's tardiness was more than "momentary"; that Underwood was told of his right to counsel but did not request counsel and that the Assistant immediately asked Underwood if he wanted to consult with counsel when counsel did appear.

* Indeed, on appeal the Government conceded that the record was insufficient to show that James had waived his right to counsel subsequent to his request.

There is no dispute that Underwood was warned that he had a right to refuse to answer any question that might tend to incriminate him. (Appellant's Brief at 20.) That warning adequately informed him of the full extent of his Fifth Amendment rights before the Grand Jury. *United States* v. *Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *United States* v. *Potash*, 332 F. Supp. 730 (S.D.N.Y. 1971).

As recently stated by the plurality in *United States* v. *Mandujano*, 44 U.S.L.W. 4629, 4633 (U.S. May 19, 1976) (No. 74-754)

> "The witness, though possibly engaged in some criminal enterprise, can be required to answer before a grand jury, so long as there is no compulsion to answer questions that are self-incriminating . . . Absent a claim of the privilege, the duty to give testimony remains absolute."

In *Mandujano*, *supra* at 4634, the Court rejected the claim—advanced by appellant here—that the target of the Grand Jury's inquiry was entitled to full *Miranda* warnings, *i.e.* a warning of an absolute right to remain silent, as "an extravagant expansion never remotely contemplated by this Court in *Miranda*."

The rule announced in *Mandujano* is entirely consistent with the established recognition that there is a fundamental difference between custodial interrogation, which requires full *Miranda* warnings, and questioning before a Grand Jury, which does not. See, *e.g. In re Groban*, *supra*, 352 U.S. at 333 and dissenting opinion of Mr. Justice Black at 346-47; *United States* v. *Potash*, *supra* at 732. Given this difference in the atmosphere of the questioning, the fact that Underwood had previously been arrested is irrelevant. Indeed, Underwood concedes that the warning given to him was "technically correct" in this respect. (Appellant's Brief at 20).

Finally, Underwood contends that the warnings given to him were inadequate because they failed to apprise him of the fact that he was the target of the Grand Jury's inquiry.

The Government clearly has the right to subpoena a potential defendant or target of a grand jury investigation. *United States* v. *Doe*, 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973); *United States* v. *Wolfson*, 405 F.2d 779, 784 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *United States* v. *Fortunato*, *supra*, 402 F.2d at 82; *United States* v. *Capaldo*, *supra*, 402 F.2d at 823-24; *United States* v. *Irwin*, *supra*, 354 F.2d at 198-99; *United States* v. *Winter*, 348 F.2d 207, 208 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965). Recently, this Court, exercising its supervisory powers in order to insure consistent practices throughout the Circuit, held that the Government was required to warn a potential defendant called before a Grand Jury that he was a "target" or subject of the investigation. *United States* v. *Jacobs*, Dkt. No. 75-1319 (2d Cir. February 24, 1976).

Appellant testified before the Grand Jury on April 16, 1975—10 months prior to this Court's decision in *United States* v. *Jacobs*, *supra*. That decision, being an exercise of this Court's supervisory power, is clearly not retroactive. *United States* v. *Guthrie*, 76 Cr. 21 (S.D.N.Y. May 12, 1976, Pierce, *J.*). *See United States* v. *Catino*, 403 F.2d 491 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969). Prior to *United States* v. *Jacobs*, prosecutors, whatever their practice, were under no obligation to give "target warnings." *United States* v. *Potash*, 332 F. Supp. at 733.*

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* Indeed, the warnings held adequate by Judge Weinfeld in *Potash* are virtually identical to those given to Underwood.

POINT II

The Failure of Defense Counsel to Examine the Presentence Report did not Deprive Underwood of the Effective Assistance of Counsel at Sentencing.

Underwood next contends that the failure of his counsel to examine the Probation Office's pre-sentence report deprived him of the effective assistance of counsel at sentencing. That claim, too, is entirely without merit.

Despite Underwood's citation of sentencing procedures for defense counsel recommended by the American Bar Association and the Second Circuit Judicial Council, the issue before this Court is not whether the failure of defense counsel to review the pre-sentence report was contrary to the practices recommended by those authorities. Rather, as this Court recently reaffirmed, the issue is whether the representation by counsel at sentencing was "so 'woefully inadequate' as to shock the conscience of the Court and make the proceedings a farce and mockery of justice! . . ." *United States* v. *Yanishefsky*, 500 F.2d 1227, 1333 (2d Cir. 1974). *Accord United States* v. *Currier*, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969); *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963). The representation by defense counsel was hardly of that nature.

Counsel representing Underwood at his sentencing, Steven Rochkind, Esq. was an associate of trial counsel. Mr. Rochkind had known the defendant personally for a number of years and had, in fact, represented him in some civil matters. Indeed, that personal knowledge enabled counsel to rebut the only two sentencing factors brought to the Court's attention by the Government * (Tr. 523-24).

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* The record is clear that those factors were only brought to the Court's attention to enable the Court to determine whether restitution would be a realistic condition of any probationary sentence.

Finally, there is no showing that counsel's failure to examine the pre-sentence report prejudiced appellant. Mr. Rochkind made a strong plea for leniency, which was later adopted by trial defense counsel in a motion for reduction of sentence. Moreover, contrary to Underwood's suggestion, it is clear that the Court's conclusion that appellant ran his business by "fencing" stolen checks was based not on the representations of the Assistant United States Attorney but on the evidence adduced at trial. (Tr. 524).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HOWARD W. GOLDSTEIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of JUNE, 1976, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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NEW YORK, NEW YORK 10007

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